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THE FISCAL CONSEQUENCES OF JUSTICE

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As regards the current decline of the death penalty in the America, I have reserved most of my scholarly criticism for the judiciary, and the Supreme Court in particular. The Court has, I have argued, often pursued an aggressive strategy of regulating capital punishment that has undermined the value of formal institutional arrangements and the mediating function of the political process, resulted in the constitutionalization of Court-prescribed ideas of harm and culpability-ranking to the categorical exclusion of rational and legitimate competing ideas, and generally diminished the authority of political institutions and communities to cope with violent crime according to their best judgments and lived experiences.¹ Indeed, I have expressly advocated a primary role for *political* actors in the national debate over the death penalty, hoping for a Nation committed to a just, fair, limited, yet robust system of capital punishment but still preferring political abolition (if, despite my opposition, communities deem abolition necessary, as New Jersey and New Mexico has recently determined) to the kind of incremental abolition being accomplished through litigation.²

But I have never held that all political arguments, for *or* against the death penalty, are created equal, and now I must aim my thrust at a disconcerting *legislative* proposition. As a consequence of hard economic times and ever-decreasing resources available for state and federal budgets, there is a movement afoot to abolish or suspend the use of capital punishment because, it is argued, capital punishment costs too much, particularly when compared to its alternatives.³ Indeed, it appears to be the abolitionist

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¹ See J. Richard Broughton, *Kennedy and the Tail of Minos*, 69 LA. L. REV. 593 (2009); J. Richard Broughton, *The Second Death of Capital Punishment*, 58 FLA. L. REV. 639 (2006)[hereinafter *Second Death*].

² See *Second Death*, *supra* note 1.

³ See Martin Kaste, *Opponents Focus On Cost in Death Penalty Debate*, NAT'L PUB. RADIO, April 1, 2009, <http://www.npr.org/templates/story/story.php?storyId=102570588>; Emanuella Grinberg, *Budget concerns force*

argument *du jour*. If there is anything to commend the fiscal arguments about the death penalty, it is that they are taking place in the political branches and, for now at least, being resolved through the political process, where they belong. Yet I fear the current debate over the cost of the death penalty is moving us toward asking chiefly, if not exclusively, about financial considerations in making legislative choices about criminal sentencing (and capital sentencing in particular), and that the debate will no longer focus on moral judgments about culpability and harm when deciding how to justly punish serious crimes against the person or the state.

This is not to say that fiscal considerations have no place in the death penalty dialogue. Capital punishment is, after all, a government program and, like other government programs, there is political sensibility, if not necessity, in ensuring that taxpayer money is spent effectively and responsibly. And, although the argument about the high costs of capital punishment has been with us for years (in good economic times and otherwise), in the existing economic climate, the argument appears to have particular force.⁴ My concern, though, is that, despite assurances from some lawmakers that it does not rank at the top of their arguments against the continued use of capital punishment,⁵ the fiscal argument *will* become dispositive. Indeed, in light of tight government budgets and the current notion that public money should be spent chiefly on programs that improve economic conditions, it is not unreasonable to fear that the fiscal argument will be transformed from simply a factor in the debate to *the* factor in

states to reconsider the death penalty, CNN, March 2, 2009, <http://www.cnn.com/2009/CRIME/03/02/economy.death.penalty>; Abigail Goldman, *Debating the cost of the death penalty*, LAS VEGAS SUN, March 4, 2009, <http://www.lasvegassun.com/news/2009/mar/04/debating-cost-death-penalty>; Steve Mills, *In many states, cost is slowly killing death penalty*, CHIC. TRIB., March 7, 2009, <http://www.chicagotribune.com/news/nationworld/chi-death-penalty-costsmar08,0,5719335.story>; Deborah Hastings, *In hard times, executions become question of cost*, ASSOCIATED PRESS, March 7, 2009, <http://www.google.com/hostednews/ap/article>.

⁴ My purpose here is not to debate the merits of cost in any particular jurisdiction, and I respect those who are genuinely concerned about being fiscally responsible, though it has always seemed to me that the costs of the death penalty are incurred chiefly on the back-end (during post-conviction review). There are, it also seems to me, alternatives to abolition that could address the fiscal problem, which leads me to believe that the fiscal argument could potentially simply serve as a red herring in the broader abolitionist project – traditional abolitionism cloaked in the rhetoric of fiscal concerns.

⁵ See, e.g., Kaste, *supra* note 3 (citing statement of a Montana State Senator that among the reasons he and others cite for abolition, “[cost] would be about fourth.”).

the debate.⁶ This could be particularly true in states and communities where abolition would require lawmakers to offer a rationale that is palatable to more conservative sensibilities – and the fiscal justification may ultimately prove far more palatable to these constituents than conventional moral and political claims against the death penalty. The danger, then, is that legislative arguments about how best to punish serious crimes of violence will be reduced to dollars and cents, rather than competing considerations of harm and culpability, and will effectively undermine the moral justifications underlying criminal punishment.

Criminal conviction and punishment reflect the political community's moral condemnation of an individual and his acts. It is a sobering responsibility of the state to impose suffering on another. And, particularly in a society of ordered liberty, it needs justification. The primary justifications for punishment – retributivism and utilitarianism – focus on the appropriate punishment for a given crime or kind of offender by asking about the culpability of the offender, the harm he has caused, or the good to society (in the form of reduced crime) that will come from punishing him and punishing him in a particularly way.⁷ The fiscal argument, however, fails to account for the individual or social harm that a crime may cause, or the moral blameworthiness of a person who is convicted of a serious crime, or the deterrent effect that a given form of punishment may have on the offender and others in the community. Thus, when the fiscal argument displaces these concerns, the criminal law is deprived of much of its moral legitimacy. And when the law deprives the community of its ability to determine whether an offender warrants the capital sanction because of his moral culpability and the harm he has caused, simply because the government chose to strip the community of that authority

⁶ See Goldman, *supra* note 3 (citing New Mexico Governor Bill Richardson's statement that the fiscal argument was a "valid reason" for abolition "in this era of austerity and tight budgets"); Kevin Johnson, *To save money on prisons, states take softer stance*, USA TODAY, March 17, 2009, http://www.usatoday.com/news/nation/2009-03-17-prison-economy_N.htm (citing New Mexico's pre-abolition study showing that abolition would save millions of dollars in New Mexico).

⁷ The larger discourse about punishment theory and moral justification is far beyond the scope of this brief commentary, *but see generally* Joshua Dressler, *Hating Criminals: How Can Something That Feels So Good be Wrong?*, 88 MICH. L. REV. 1448 (1990); Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315 (1984); Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343 (1983); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968).

as a cost-saving measure, we can no longer be confident about the efficacy of the moral condemnation that the criminal law ultimately brings to bear upon that offender. Where this is true, punishment, rather than reflecting society's reasoned moral response to crime, looks more like an affordable consolation.

Moreover, giving great weight to the fiscal argument will ultimately serve as a distraction from, and thus undermine, other, legitimate arguments against capital punishment.⁸ If we choose to live in a society in which capital punishment is unavailable, let it not be because, in the end, we simply chose the option that cost us the least.

Consider some especially notable killers. Consider, for example, John William King, Lawrence Russell Brewer, and Shawn Berry—two of whom were white supremacists and supporters of the Ku Klux Klan—who abducted an African-American named James Byrd in Jasper County, Texas, chained him to a pickup truck, and dragged his body for approximately three miles through the rural area, decapitating and dismembering him along the way.⁹ Consider also the leaders of the ruthless Aryan Brotherhood prison gang who, while incarcerated, ordered or committed fifteen murders over a twenty-five-year period;¹⁰ or the members of violent street gangs like MS-13, the Latin Kings, and the Gangster Disciples, that have perpetrated numerous brutal acts of violence in, and ravaged, communities throughout our Nation.¹¹ Consider the notorious mass murderers of our time. It is not difficult to catalogue the atrocious murders that have forced our communities to exercise complicated moral judgments about the punishment that should befall these killers. Some of these killers received the death penalty, some did not. But imagine that—rather than ask about the nature of the crime, the moral depravity of the defendant's actions, the culpability of the individual

⁸ These are not, of course, arguments to which I adhere, but I acknowledge that some have much force.

⁹ *See King v. State*, 29 S.W.3d 556, 558–562 (Tex. Crim. App. 2000).

¹⁰ *See United States v. Littrell*, 478 F. Supp. 2d 1179, 1181–85 (C.D. Cal. 2007); Ina Jaffe, *Aryan Brotherhood Leaders Convicted of Murder*, NAT'L PUB. RADIO, July 28, 2006, <http://www.npr.org/templates/story/story.php?storyId=5591170>.

¹¹ *See generally* NATIONAL GANG THREAT ASSESSMENT, REPORT OF THE NATIONAL GANG INTELLIGENCE CENTER & NATIONAL DRUG INTELLIGENCE CENTER (2009) available at www.fbi.gov/publicatioins/ngta2009.pdf.

defendants involved, or the effect that a particular punishment may have in preventing other socially harmful acts—the ultimate question we asked when determining the kind of punishment that ought to be imposed for these crimes is whether we could finance the process for rendering the more just punishment.

There is, perhaps, a broader lesson for legislators here. Despite the (sometimes disingenuous) public outcry over excessive government spending and the urge to satisfy the immediate passions of constituents who simultaneously demand that governments always choose among the least costly alternatives while also demanding that those same governments spend vast amounts on programs that will serve their own narrow interests, the legislator in a republican government must recall his obligation to “refine and enlarge the public view,”¹² to serve as a filter for and to moderate public passions, and to resist the temptation to satisfy the immediate desires of a demanding public. He must also resist the urge to reduce every important decision to dollars. Ensuring that the state provides a proper and just punishment for serious crimes is among those decisions that require justification beyond the monetary. It requires acknowledging that the moral justifications for punishment ought to serve as the primary basis of penal legislation, and it requires careful deliberation about the meaning of suffering and of life, and of justice and the responsibility of the state in dispensing it. Whom, how, and particularly *why* we punish says much about the kind of political community we are, especially our vision of and commitment to justice. We diminish the significance of this decision, our moral authority to punish, and our sensibilities about justice—we cheapen them—if we treat the debate over punishment as we would treat the funding of a pothole repair project or a new baseball stadium.

There are grave dangers to civil society, then, by giving too much weight to the fiscal arguments for abolition. Particularly over time, the deterioration of government budgets is—with thoughtful prioritizing and disciplined management—a fixable, if still complicated, problem. It will be far more difficult, however, to repair the deterioration of justice.

¹² THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter, ed. 1961).